

40 North Central Avenue
Phoenix, Arizona 85004-4429
Facsimile (602) 262-5747
Telephone (602) 262-5311

Randolph J. Haines – State Bar No. 005440
Email: rjh@lrlaw.com

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1900 Pennzoil Place – South Tower
711 Louisiana
Houston, Texas 77002
Telephone (713) 220-5800
Facsimile (713) 236-0822

H. Rey Stroube, III-Texas State Bar No. 19422000
S. Margie Venus-Texas State Bar No. 20545900
Email: efiler@akingump.com

Attorneys for Debtor BCE West, L.P., et al.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

	)	Chapter 11
In Re:)	
	)	Case Nos. 98-12547 through
BCE WEST, L.P., et al.,	)	98-12570-ECF-CGC
)	
Debtors.	)	Jointly Administered
)	
EID: 38-3196719	)	MOTION FOR AUTHORITY TO
	)	COMPROMISE AND SETTLE
	)	CONTROVERSY AND MOTION TO
	)	APPROVE PURCHASE OF
	)	TRADEMARK FROM AMERICAN
	)	VALUE BRANDS

BCE West, L.P., Boston Chicken, Inc., Mayfair Partners, L.P., BC Great Lakes, L.L.C.,
BC GoldenGate, L.L.C., B.C.B.M. Southwest, L.P., BC Boston, L.P., BC Superior, L.L.C., BC
Heartland, L.L.C., BC Tri-States, L.L.C., Finest Foodservice, L.L.C., BC New York, L.L.C.,
R&A Food Service, L.P., P&L Food Services, L.L.C., Mid-Atlantic Restaurant Systems, Inc.,
BCI Massachusetts, Inc., BCI Southwest, Inc., BC Real Estate Investments, Inc., BCI Mayfair,
Inc., Progressive Food Concepts, Inc., BCI R&A, Inc., BCI West, Inc., BCI Acquisition Sub,

1 L.L.C., and Buffalo P&L Food Services, Inc., debtors and debtors in possession (the “Debtors”)
2 request this Court to enter an order providing for the following: (1) approval of a compromise
3 and settlement with American Value Brands (“AVB”) and (2) approval of purchase of trademark.
4 In support of the relief requested, the Debtors respectfully represent as follows.

5 **I. JURISDICTION**

6 1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and
7 1334. The venue of this proceeding in this Motion is proper in this district pursuant to 28 U.S.C.
8 §§ 1408 and 1409. The statutory predicate for the relief sought herein is 11 U.S.C. §§ 365 and
9 105. This is a core matter as provided by 28 U.S.C. § 157(b)(2)(A), (M) and (O).

10 **II. BACKGROUND FACTS**

11 2. On October 5, 1998 (the "Petition Date"), the Debtors filed their voluntary
12 petitions for relief under Title 11, Chapter 11 of the United States Code. Since the Petition Date,
13 the Debtors have continued to operate their businesses and manage their properties as debtors-in-
14 possession pursuant to 11 U.S.C. §§ 1107 and 1108. The separate petitions are now jointly
15 administered pursuant to an order of this Court.

16 3. In June of 1997, BCI commenced an action against AVB in the United States
17 District Court for the Northern District of Illinois. The complaint alleged that AVB infringed on
18 certain BCI trademarks through applications seeking to register the word mark “BOSTON
19 KITCHEN” and a design mark incorporating the words “BOSTON KITCHEN” in a double oval
20 design similar to the double oval design used in several registered trademarks owned by BCI,
21 including the “BOSTON CHICKEN” and “BOSTON MARKET” logos. The specific allegations
22 of the complaint included, among other things, federal trademark infringement, Lanham Act
23 violations, federal trademark dilution, violations of state law and unfair competition. AVB filed
24 counterclaims against BCI. However, BCI is of the opinion that such counterclaims are without
25 merit.
26

1 4. Prior to commencing the litigation, BCI had filed with the U.S. Patent and
2 Trademark Office (“USPTO”) a Notice of Opposition to AVB’s application expressing an intent
3 to use the mark “BOSTON KITCHEN” in commerce, filed in August of 1994. Under the
4 applicable rules governing trademark applications, a party filing an “intent-to-use” application
5 has three years from the time the application is cleared by the USPTO examiner, in six month
6 increments to show actual use of the mark in commerce. BCI also filed an intent-to-use
7 application on this mark in October of 1994. Research done at the time of BCI’s application did
8 not reveal the existence of the AVB application. The filing by BCI of the Notice of Opposition
9 suspended further action on AVB’s application.

10 5. In late October of 1996, AVB filed a use application for the design mark using the
11 words “BOSTON KITCHEN” in a double oval design similar to that of the BCI marks. This
12 application alleged actual use of the design mark dating back to September, 1995. Unlike an
13 intent-to-use application, which merely indicates interest in a particular mark and some interest in
14 future use, an application alleging use allows for registration to issue on that mark once the mark
15 is cleared by the USPTO examiner, and actual use is proven. Though BCI’s complaint resulted
16 in the suspension of this application so that no registration will issue during the pendency of the
17 litigation, AVB has, in fact, proven use dating back to September 1995, and a registration should
18 issue on this mark as soon as the litigation is concluded.

19 6. BCI believes that it is in its best business judgement of the estate to purchase this
20 word and design mark for the nominal sum \$5,000. Acquiring another mark with the double oval
21 design strengthens and expands BCI’s rights in its signature logo mark, and provides it rights to
22 the “BOSTON KITCHEN” words as part of the design. Additionally, the BCI Marketing
23 Department has expressed a definite interest in using it in the future.

24 7. Further, acquisition of the registered mark includes an assignment to BCI of all
25 rights held by AVB dating back to AVB’s first use of the design mark, thus allowing BCI to
26 “relate back” in use to 1995. This will assist BCI in asserting rights against other individuals or

1 entities claiming rights to or using the mark even before the time that BCI filed its own intent-to-
2 use application.

3 8. As of July 10, 1999, BCI's original ITU application expired. Since BCI was
4 unable to show actual use of the mark by this date, the only alternative way to preserve any rights
5 in the BCI word mark was to file another ITU application, which BCI has accomplished. BCI's
6 rights under this application will exist only from the date of filing. While a Lexis search did not
7 reveal any intervening registrations at the state or federal level, there could be common law rights
8 of which we are unaware, which will make the later filing far less favorable. Additionally, BCI
9 must now show actual useage in the next three years.

10 **III. RELIEF REQUESTED**

11 9. Debtors seek, through this Motion, to obtain the Court's approval of the settlement
12 agreement negotiated between BCI and AVB.

13 10. Additionally, as a consequence of the terms of the settlement, BCI is also
14 requesting the Court's approval of the purchase of the design trademark from AVB for \$5,000.

15 11. The terms and conditions of the proposed settlement have not yet been
16 consummated but are generally set forth as follows:

17 a. Upon approval of the settlement agreement, all pending litigation
18 between BCI and AVB will be dismissed with prejudice;

19 b. AVB will discontinue use of its product line which uses the
20 trademark; and
21

22 c. BCI will pay AVB \$5,000 for the assignment of all rights in and to
23 the "BOSTON KITCHEN" design mark.
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12. The Debtors assert that this compromise and settlement is in the best interests of their estates and provides positive benefits. The expense and uncertainty of litigation are avoided, and BCI gains, for a nominal sum, an asset that will be of use to it in expanding and protecting the Boston Market brand.

13. In light of the foregoing, the Debtors believe that they have established sufficient cause to support the approval of the compromise and settlement as requested.

WHEREFORE, premises considered, Debtors respectfully request that this Court enter an order providing for the following: (1) approval of a compromise and settlement with AVB and (2) approval of the purchase of the assignment rights of the trademark as described herein, and for such other relief as the Court deems appropriate.

Respectfully submitted this 8th day of September 1999.

DEBTORS AND DEBTORS IN POSSESSION

By: /s/ H. Rey Stroube, III
One of their Attorneys

AKIN, GUMP, STRAUSS, HAUER &
FELD, L.L.P.
H. Rey Stroube, III
S. Margie Venus
1900 Pennzoil Place – South Tower
711 Louisiana
Houston, Texas 77002
(713) 220-5800
(713) 236-0822 (fax)
E-mail: efiler@akingump.com

- and -

1 LEWIS AND ROCA LLP
2 Randolph J. Haines
3 40 North Central Avenue
4 Phoenix, Arizona 85004-4429
5 (602) 262-5311
6 (602) 262-5747
7 E-mail: rjh@lrlaw.com

8 **CERTIFICATE OF SERVICE**

9 The undersigned hereby certifies that on September 8, 1999, the foregoing document was
10 served by e-mail or by first class United States Mail, postage prepaid, on the Master Mailing List
11 # 12 dated August 26, 1999.

12 _____
13 /s/ Karen Anders
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